No. 11,917

IN THE

United States Court of Appeals

For the Ninth Circuit

GEORGE H. RICHARDSON,
Appellant,

vs.

THE TRAVELERS INSURANCE COMPANY,
Appellee.

APPELLEE'S PETITION FOR A REHEARING.

(Or, If a Rehearing Be Denied, For a Stay of Mandate.)

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Table of Authorities Cited

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To the Honorable Justices of the United States Court of Appeals for the Ninth Circuit:

Appellee respectfully petitions for a rehearing of the above cause decided on December 13, 1948, and in support thereof urges that the decision of this Court, that the incontestable clause of the policy of insurance bars an action for reformation of the policy after the expiration of the time limit therein contained, is erroneous.

The opinion uses language that is not applicable to the facts of the case. The opinion states:

> "It [this contract] is not a reference to the oral conversations and negotiations preliminary to the

execution of the written instrument, but rather to the formal writing itself."

The mistake in this instance is not shown by oral conversations. It is shown on the written instrument itself. The application, made a part of the policy, designates one form of policy. Another part of the instrument designates a different form. The oral conversations introduced on behalf of the insurance company were merely to rebut a claim by the insured that he had been misled by statements alleged to have been made by employees of the company.

This Court, in its decision, relies almost exclusively on the cases which hold that the defense of fraud is barred by the incontestable clause contained in an insurance policy and reasons by analogy from such decisions.

See, for example:

Dibble v. Reliance Life Insurance Co., 170 Cal. 199.

Appellee respectfully submits that an action for reformation on the grounds of mistake is not comparable to the defense of fraud in any way. It must be remembered that in this case the trial court found upon ample evidence, and this Court has apparently approved such finding, *that the only contract* entered into between appellant and appellee was that applied for in the application for insurance made part of the policy. (Plaintiff's Exhibit "A", R. 5.) If this be true, the only contract upon which there was a meeting of the minds and to which the incontestable clause in

the policy could apply was the so-called annuity form policy. If appellee sought to introduce any defense to *that* policy, the incontestable clause would apply. Such would be the defense of fraud. The defense of fraud seeks to avoid the policy and is, in fact, a contest of it. The policy to which this Court has held the incontestable clause applies is one that was never discussed by the parties and one which the trial court held, on the same competent evidence, never came into being. The action in the present case was not a contest of any contract of insurance. It was a proceeding in which appellee sought to have the true agreement of the parties expressed rather than a mistaken one. To hold that this is a contest of the policy begs the question.

We submit the opinion gives an erroneous interpretation of the words "This Contract". A written instrument is not itself the contract. It is evidence of the contract. A court of equity cannot make a contract. It may reform a written instrument to properly express the agreement entered into (see *Hunt v. Rhodes, et al.,* 1 Pet. (U.S.) 1, 7 Law. Ed. 1) and in this proceeding the change sought is not in the contract but in the evidence of the contract. The provision does not read "This written instrument shall be incontestable" nor "This policy shall be incontestable". By the term "This contract" reference is made to the contract of which the policy is but evidence.

Appellee is well aware of the history of the incontestable clause and the reasons why it was introduced into insurance policies. It is submitted, however, that

it is one thing to hold that an insurer should not be allowed to contest an otherwise valid contract upon which there has been a meeting of the minds and quite another to say that an insurer should not be permitted to protest that a contract, as written, does not express the actual meeting of the minds.

Although the incontestable clause in the policy is almost universally invoked by the insured and is primarily for his benefit, it is not limited by its terms to the insured and conceivably could be invoked by the insurer in a proper case. If the converse of the present case had occurred and the company by mistake had inserted a provision in the contract giving to the insured one-half the benefits that he applied and paid for, would any court hold that an action to reform such contract was barred by the incontestable clause? We believe, under such circumstances, a court would have no difficulty in saying to the insurance company that refused to live up to the agreement it made, but which is erroneously failed to express, "the only contract you entered into was the one upon which you had a meeting of the minds. You cannot take the insured's money and give him half of what he paid for, notwithstanding the incontestable clause". This rule should work both ways.

The only adjudicated decisions on this subject prior to the case at bar are the cases cited in this Court's opinion, to-wit:

Columbia National Life Insurance Co. v. Black, 35 F. (2d) 571;

Buck v. Equitable Life Assurance Society, 165 Pac. 878;

Mates v. Pennsylvania etc. Co., 55 N. E. (2d) 770.

These cases are uniform that the incontestable clause does not bar a suit for reformation. This Court, for the reasons stated in its opinion, has seen fit to reject these cases, but it is submitted that the reasons given by this Court are based upon the false assumption that a suit for reformation is a contest rather than an action to have the policy speak the true agreement of the parties and it is submitted that the only agreement to which the incontestable clause applies is the agreement upon which there has been a meeting of the minds and no other.

For the foregoing reasons a rehearing should be granted.

In the event of a denial of this petition, appellee intends to apply to the Supreme Court of the United States for a writ of certiorari and therefore prays for a stay of mandate of this Court for thirty (30) days in order to enable appellee to make such application.

Dated, San Francisco, California,
January 7, 1949.

Respectfully submitted,
JOSEPH T. O'CONNOR,
HAROLD H. COHN,
Attorneys for Appellee and Petitioner.

CERTIFICATE OF COUNSEL.

We hereby certify that we are counsel for appellee and petitioner in the above-entitled cause and that in our judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact, and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco, California,
January 7, 1949.

JOSEPH T. O'CONNOR,
HAROLD H. COHN,
Counsel for Appellee and Petitioner.